81-75

Office-Supreme Court, U.S.
FILED
JUL 9 1981
ALEXANDER L. STEVAS

Case No. 80-[illegible]

In The

Supreme Court of the United States

October Term, 1981

JUAN GONZALES-GARCIA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Appeal from the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JERALYN E. MERRITT

50 South Steele Street, No. 375
Denver, Colorado 80209
Telephone: (303) 388-6252

Attorney for Petitioner

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

QUESTION PRESENTED

Whether the denial of Defendant-Appellant's pre-trial motion for a two week continuance based upon the facts that Defendant-Appellant spoke and understood very little English and that his trial counsel entered his appearance only seven days prior to trial, deprived him of his Constitutional rights to a fair trial, due process of law and effective assistance of counsel, when the requested continuance would not have placed him outside the Speedy Trial Act, and no prior continuances of the trial had been requested or granted.

TABLE OF CONTENTS

	Pages
Question Presented	i, 2
Opinions Below	2
Jurisdiction	2
Question Presented	2
Constitutional Provisions Involved	3
Statement	3
Reasons for Granting the Writ	5
Conclusion	6
Appendix A	App. 1

TABLE OF AUTHORITIES

CASES:

United States v. Golub, 638 F. 2d 185 (10th Cir. 1980) 6

STATUTES:

18 U. S. C., § 2 4

21 U. S. C., § 841 (a) (1) 4

21 U. S. C., § 846 4

Title 28 U. S. C., § 1254 (1) 2

CONSTITUTION:

Constitution of the United States, Fifth Amendment 3, 5

Constitution of the United States, Sixth Amendment 3, 5

Case No. 80-1242

In The

Supreme Court of the United States

October Term, 1981

JUAN GONZALES-GARCIA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Appeal from the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Juan Gonzales-Garcia, the Petitioner, respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled cause on March 2, 1981.

OPINIONS BELOW

This cause was decided by a panel of the United States Court of Appeals for the Tenth Circuit on March 2, 1981, in an opinion which has been designated for routine publication. The opinion is reproduced as Appendix A hereto. A Petition for Rehearing was denied on May 13, 1981.

———o———

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on March 2, 1981. (See Appendix A.)

The jurisdiction of this Court is invoked under Title 28 U. S. C., § 1254 (1).

———o———

QUESTION PRESENTED

Whether the denial of Defendant-Appellant's pretrial motion for a two week continuance based upon the facts that Defendant-Appellant spoke and understood very little English and that his trial counsel entered his appearance only seven days prior to trial, deprived him of his Constitutional rights to a fair trial, due process of law and effective assistance of counsel, when the requested continuance would not have placed him outside the Speedy Trial Act, and no prior continuances of the trial had been requested or granted.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Fifth Amendment

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be witness against himself; not be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Constitution of the United States, Sixth Amendment

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

———o———

STATEMENT

In November of 1979, a grand jury returned a four count indictment against Defendant-Appellant, the first three counts of which alleged that he participated in the

unlawful distribution of heroin, in violation of 21 U. S. C. § 841 (a) (1) and 18 U. S. C. § 2; the remaining count alleged Defendant-Appellant's participation in a conspiracy to distribute heroin in violation of 21 U. S. C. § 846.

At a pre-trial hearing on Defendant-Appellant's Motion for Continuance held on January 9, 1980, the following facts were adduced:

(1) Defendant was requesting a continuance of only two weeks, which would not have placed any of the Defendants outside the provisions of the Speedy Trial Act.

(2) No prior continuances of the trial had been requested.

(3) The reason for not retaining counsel earlier was Defendant's inability to meet counsel's quoted fee requirements.

(4) Although the Court appointed counsel to represent Defendant on December 6, 1979, on a non-indigency basis, counsel never once met with the Defendant nor returned his phone calls; in fact, Defendant never met with any counsel regarding this matter until less than two weeks prior to trial.

(5) Between 80 to 100 of the 150 pages of discovery pertained to Defendant-Appellant; Defendant's counsel did not have adequate time to have this material translated into Spanish for Defendant, thereby enabling him to analyze same and aid in his defense.

Among the reasons stated by the trial court in denying Defendant's Motion for Continuance were the following:

(1) Defendant was represented by attorneys experienced in criminal law since December 6, 1979.

(2) Defendant was able to converse with his attorney and aid in his defense with the assistance of an interpreter.

(3) The case was not complex.

(4) The investigation of court-appointed counsel and his observations would be readily transferred to trial counsel.

(5) The discovery material could be digested in several hours.

After a two day trial commencing on January 14, 1980, a jury returned a verdict of guilty against Defendant-Appellant on all counts. Defendant-Appellant then took an Appeal to the United States Court of Appeals for the Tenth Circuit and his conviction was affirmed.

———o———

REASONS FOR GRANTING THE WRIT

This Honorable Court should grant the Writ in order to determine whether the denial of Petitioner's Motions for Continuance made prior to and during the course of his trial amounted to a clear abuse of discretion resulting in manifest injustice, in violation of Defendant-Appellant's rights under the Fifth and Sixth Amendments to the United States Constitution.

Petitioner asserts that the decision of the United States Court of Appeals in his case is contradictory to

said Court's position on the issue as set forth in *United States v. Golub*, 638 F. 2d 185 (10th Cir. 1980) wherein the Court stated that (1) ineffective representation can encompass inadequate time and opportunity for preparation of the case even though no error in the trial defense is apparent, and (2) a Defendant is not required to show actual prejudice to sustain a claim of ineffective assistance of counsel. In *Golub, supra*, as in the instant case, counsel entered his appearance one week prior to trial. The constitutional problems of Petitioner were enhanced by the fact that he spoke and understood very little English, which precluded an adequate review of the 150 pages of discovery material and a meaningful direct examination during trial.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

JERALYN E. MERRITT

50 South Steele Street, No. 375
Denver, Colorado 80209
Telephone: (303) 388-6252

Attorney for Petitioner

APPENDIX A

3-2-81 80-1240 - 80-1242

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SLIP OPINION
(Filed March 2, 1981)

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 80-1240 & 80-1242

UNITED STATES OF AMERICA
Plaintiff-Appellee.

vs.

EDWARD PAUL GONZALES-PALMA, JR., and
JUAN GONZALES-GARCIA,
Defendants-Appellant.

Appeal from the United States District Court
for the District of Colorado

(D. C. No. 79 CR 569)

(Filed March 2, 1981)

Philip A. Cherner, Denver, Colorado, on the brief for Defendant-Appellant Edward P. Gonzales-Palma, Jr.

Sylvian R. Roybal, Denver, Colorado, for Defendant-Appellant Juan Gonzales-Garcia.

Daniel R. Christopher, Assistant United States Attorney (Joseph Dolan, United States Attorney, with him on the brief), Denver Colorado, for Plaintiff-Appellee.

Before HOLLOWAY, BARRETT and LOGAN, Circuit Judges.

LOGAN, Circuit Judge.

Juan Gonzales-Garcia was convicted by a jury on four counts of participation in unlawful distribution of heroin and conspiracy to sell and distribute heroin in violation of 21 U. S. C. §§ 841 (a) (1) and 846, and 18 U. S. C. § 2. Edward P. Gonzales-Palma, Jr., was convicted in the same trial on one count of participation in unlawful distribution of heroin and on one count of conspiracy to sell and distribute heroin. Each appeals his conviction, making different arguments on appeal. Since the cases were tried together, the appeals were consolidated in this Court.

80-1240

Edward P. Gonzales-Palma, Jr., urges in his appeal that it was error for the trial court (1) to instruct the jury that heroin is a Schedule I controlled substance as a matter of law and (2) to refuse a jury instruction concerning accomplice testimony.

The government established that the substance sold in the transactions at issue was heroin, but made no attempt to show that heroin is a narcotic and did not ask the court to take judicial notice of the narcotic classification of

heroin. The court ruled that the classification was a question of law and so instructed the jury. Gonzales-Palma argues the legal status of heroin is a question of fact that must be proven by judicial notice or otherwise at the trial and that the government's case was fatally defective for failure to offer this proof.

We find no merit in appellant's position on this issue. We agree with United States v. Porter, 544 F. 2d 936, 940 (8th Cir. 1976), which responded to the same argument as follows:

> "The defendant also contends that the trial court erred in denying his motion for a judgment of acquittal because the government adduced no proof that heroin is a Schedule I narcotic controlled substance. Whether or not the substance transferred is a Schedule I narcotic controlled substance is a question of law, not fact. The jury was properly instructed that heroin is a Schedule I controlled substance as a matter of law."

We have also held that failure to publish updated schedules listing heroin as a controlled substance does not result in its decontrol. "Those substances, unless removed by action of the Attorney General, [continue] to be controlled substances regardless of publication." United States v. Huerta, 547 F. 2d 545, 547 (10th Cir. 1977).

We also agree with the trial judge that an instruction regarding testimony of accomplices would have been inappropriate since no accomplice testified in this case. The government's case against Gonzales-Palma was based principally upon the testimony of Drug Enforcement Administration (DEA) Agent Arroyo who described his undercover purchases of heroin and recounted his conversations with those assisting in the sales. Arroyo's recital of state-

ments made to him by various coconspirators of Gonzales-Palma was not accomplice testimony under the rules of evidence; hence United States v. Owens, 460 F. 2d 268 (10th Cir. 1972), relied upon by appellant, is inapposite.

80-1242

Appellant Juan Gonzales-Garcia urges that the court erred in refusing to grant his pre-trial motion for a continuance. He also argues there was insufficient evidence to support the jury verdict against him on the conspiracy count.

The decision to grant or deny a motion for continuance is committed to the sound discretion of the trial judge, and we may reverse only upon a showing of clear abuse of discretion resulting in manifest injustice. United States v. Schwanke, 598 F. 2d 575 (10th Cir. 1979). Gonzales-Garcia's request for a continuance was based primarily upon the fact that he speaks very little English and that counsel representing him at trial entered his first appearance only seven days before trial. The record indicates that Gonzales-Garcia is not indigent. He first appeared before the court on November 23, 1979, and made bond. He made two subsequent appearances asking for a continuance each time on grounds he was unrepresented by counsel. On December 6, when he again appeared without counsel, an attorney was appointed for him. The pleadings show that on January 3, Gonzales-Garcia retained Arthur Nieto, a bilingual attorney who represented him at his trial, which commenced January 14. Nieto, on behalf of his client, moved for a continuance on January 8 and again at trial. The court denied this motion after careful consideration, noting that the case was not overly

complex, that it was based primarily upon the testimony of undercover agent Arroyo, and that discovery consisted of approximately 150 pages of reports submitted by the Drug Enforcement Administration.

In Ungar v. Sarafite, 376 U. S. 575 (1964), the Supreme Court held that five days notice "was not a constitutionally inadequate time to hire counsel and prepare a defense to a case in which the evidence was fresh, the witnesses and the evidence readily available, [and] the issues limited and clear cut." *Id.* at 590. This Court has also upheld orders denying motions for continuance in cases involving relatively short preparation time. *See* United States v. Schwanke, 598 F. 2d 575 (fourteen working days); United States v. Vandivere, 579 F. 2d 1240 (10th Cir. 1978) (fourteen days). United States v. Golub, No. 79-1577 (10th Cir., November 17, 1980), relied upon by defendant, involves significantly different facts and is inapposite here, in our view. We have reviewed the motions made by counsel and counsel's performance during trial and are convinced that appellant was well represented and that no manifest injustice resulted from the court's denial of the requested continuance.

In reviewing Gonzales-Garcia's claim that the evidence was insufficient to support the jury's verdict on the conspiracy count, we neither weigh conflicting evidence nor consider the credibility of witnesses. Rather, we view the evidence in the light most favorable to the government and determine "whether there is substantial evidence, either direct or circumstantial, which, together with the reasonable inferences that may be drawn therefrom, sustains the verdict." Steiger v. United States, 373 F. 2d 133, 135 (10th Cir. 1967).

The government's case against Gonzales-Garcia was constructed principally upon the testimony of Agent Arroyo, corroborated by the physical evidence of the heroin obtained and the testimony of other agents who had maintained close surveillance. Arroyo's testimony regarding actions and statements by persons other than Gonzales-Garcia was ample to support the jury's finding of conspiracy. Defendant took the stand in his own behalf and denied each transaction and conversation particularized by Agent Arroyo. This presented a classic evidentiary conflict, which was resolved by the jury in favor of the government. We must affirm that determination.

The convictions in both cases are AFFIRMED.